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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Petitioners,

v.

JAMES EARL REID,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 17, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Whether, under the "work made for hire" provisions of the Copyright Act of 1976, 17 U.S.C. §§ 101 and 201(b), Petitioners own the copyright in a statue made by Respondent and others at Petitioners' request and expense and under Petitioners' direct supervision and control.

LIST OF PARTIES

1. Petitioners are the Community for Creative Non-Violence, an unincorporated association of individuals, and Mitch Snyder.

2. Respondent is James Earl Reid.

3. Ronald Purtee was named a defendant in the District Court; however, he did not appear before the District Court or the Court of Appeals.

4. The Copyright Justice Coalition, an ad hoc group of some fifty different organizations, filed an amicus curiae brief in the Court of Appeals in support of Respondent.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 846 F.2d 1485 (D.C. Cir. 1988), and is reproduced in the Appendix ("App.") hereto at App. 1a-28a. The opinion of the United States District Court for the District of Columbia is reported at 652 F. Supp. 1453 (D.D.C. 1987), and is reproduced at App. 29a-36a.

JURISDICTION

This case arises under the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* Federal jurisdiction is founded upon 28 U.S.C. § 1338. After a bench trial, the District

Court (Jackson, J.) entered judgment for Petitioners. The Court of Appeals (R. Ginsburg, J.) reversed and remanded in a decision rendered May 20, 1988. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

Section 101 of the Copyright Act of 1976, 17 U.S.C. § 101, provides in relevant part:

> A "work made for hire" is
>
> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Sections 201(a) and (b) of the Copyright Act of 1976, 17 U.S.C. §§ 201(a) and (b), provide:

> (a) Initial Ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.
>
> (b) Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

STATEMENT OF THE CASE

This case calls upon the Court to resolve a direct and acknowledged conflict among four circuits over the proper interpretation of the "work made for hire" ("work for hire") provisions of the Copyright Act of 1976 ("Act" or "1976 Act"), 17 U.S.C. §§ 101 and 201(b).

Under the work for hire doctrine, an "employer" owns the copyright in a work made by an "employee within the scope of his or her employment." The issue on which the courts have divided involves construction of the terms "employer" and "employee," neither of which is defined in the Act. Consistent with case law developed under the Copyright Act of 1909, the Second and Seventh Circuits have held that an employment relationship exists where the artist works at the request and expense, and under the direct supervision and control, of the hiring party. The Fifth Circuit, however, has explicitly rejected this approach and prior case law, relying instead upon factors set forth in the Restatement of Agency Law to determine the existence of an employment relationship. The conflicting approaches are manifest in the present case where the Court of Appeals for the District of Columbia Circuit, reversing the District Court below, expressly aligned itself with the Fifth Circuit and refused to follow the work for hire standard set forth in the Second and Seventh Circuit decisions.

1. *Statement of Facts*

This case involves a dispute over ownership of the copyright in a statue entitled "Third World America"—a contemporary Nativity scene depicting a homeless black family huddled on a streetside steam grate. Petitioners are the Community for Creative Non-Violence ("CCNV"), a non-profit unincorporated association of individuals dedicated to eliminating homelessness in America, and Mitch Snyder ("Snyder"), a member of CCNV. Respondent, James Earl Reid ("Reid"), is a Baltimore, Maryland

sculptor selected by Petitioners to produce certain portions of "Third World America." [1]

The concept for "Third World America" originated with Snyder and other CCNV members who, in early October 1985, decided to produce a work which would serve as a graphic reminder of the nation's homeless.[2] CCNV intended to unveil the work in mid-December 1985 as part of the Christmas Pageant of Peace in Washington, D.C. The work was ultimately to be used as a "centerpiece of a one-or-two-year campaign of education and outreach and fundraising." 2/2 Tr. 24 (Snyder).[3]

At the recommendation of an artist active in the homeless cause (Tom Lewis), Snyder contacted Reid in late October 1985. Snyder informed Reid as to the precise nature and purpose of the work that CCNV wished to have produced (*see* note 2 *supra*), as well as the tight schedule for its production. Reid agreed to work full-time during the ensuing weeks to sculpt the figures for

[1] The statue consists of two separately prepared pieces which were integrated into a "unitary whole"—three life-size figures with the family's belongings stacked inside a shopping cart, and a steam grate and base. *See* 652 F. Supp. at 1454 (App. 30a); 846 F.2d at 1496 (App. 22a). Reid had no involvement in the creation of the base or steam grate. Reid, with a dozen "assistants" whose services were paid for from the funds which CCNV paid to Reid, sculpted the figures.

[2] They determined that the work was to be a sculpture of a modern creche with two homeless adults huddled over their infant child on a streetside steam grate; that the family was to be black because most of the homeless in Washington, D.C. are black; that the figures were to be life-sized; that the steam grate would be positioned on top of a pedestal containing special effects equipment to produce steam swirling around the figures; that the work would be entitled "Third World America"; and that the base would bear the inscription "And Still There Is No Room At The Inn." 652 F. Supp. at 1454 (App. 30a).

[3] The designation "Tr." preceded by a date refers to the transcript of the trial before the District Court below, including the transcript of the hearing on the preliminary injunction motion (which was incorporated into the trial record). The name in parentheses refers to the identity of the witness.

"Third World America" in advance of the Pageant of Peace; however, he did not have time to produce the steam grate and base.[4] Although Reid said he would forgo any salary and donate his services, he estimated that his "production costs" would be between $12,000 and $15,000. Reid explained the nature of these costs, stating:

> . . . I needed a number of assistants and workers to assist me, and I needed materials, and I needed to maintain my quarters, so to speak, which included the rental of my studio and so forth.

2/3 Tr. 155-56 (Reid). CCNV ultimately paid Reid the full $15,000. This amount was raised through a special auction of art works donated by artists who sought to dramatize the plight of the homeless—and who were assured by CCNV that their efforts would not "go to another artist's profit." 2/2 Tr. 100 (Beck).

During the seven-week period when Reid and his several "assistants" worked on the "Third World America" figures, Snyder and other members of CCNV made some ten to fifteen trips to Reid's studio in Baltimore "to make sure that the statue was what [CCNV] wanted it to be." 7/25 Tr. 12 (Snyder). At CCNV's request, Reid came to Washington, D.C. to observe homeless people in the setting CCNV wished to capture in "Third World America." *Id.* at 11-12 (Snyder). CCNV also required Reid to produce design sketches and photographs of the work-in-progress. 2/2 Tr. 39-41, 58-59 (Snyder). Furthermore, Tom Lewis, the artist who recommended Reid and who became one of Reid's assistants, served as a liaison between Reid and CCNV so that CCNV could

[4] CCNV had the steam grate and base constructed at a cost of approximately $7,000 to $8,000. The figures, steam grate and base were assembled together in Washington, D.C. when "Third World America" was placed near the Ellipse. 846 F.2d at 1487-88 (App. 3a-4a); 652 F. Supp. at 1455 (App. 33a).

continuously monitor the progress of the work. 2/2 Tr. 122 (Lewis); 2/2 Tr. 53 (Snyder). Throughout this process CCNV directed Reid as to a number of the details concerning "Third World America."[5] As Lewis testified, "[t]he major decisions about the idea, the placement and the detail . . . were made by Mitch Snyder and CCNV." 2/2 Tr. 124 (Lewis).

Petitioners and Respondent never entered into any written agreement concerning "Third World America." Nor did they have any agreement, written or oral, concerning copyright ownership of that work. The dispute between the parties arose in March 1986 when Reid, who had possession of "Third World America" for purposes of making certain repairs, refused to return the work to CCNV. Reid announced that he intended to take the sculpture on his own exhibition tour, thereby precluding CCNV from going forward with its plans to do the same in order to raise money for the homeless.

2. *Proceedings Below*

Petitioners filed the present lawsuit in June 1986, seeking return of the sculpture and a declaration that they own the copyright in it. The District Court, on Petitioners' motion for a preliminary injunction, ordered the statue's return to CCNV. After a two-day bench trial in February 1987, the District Court entered a final judgment in favor of Petitioners, declaring that Snyder (as trustee for CCNV) owns the copyright in "Third World America" pursuant to the work for hire doctrine.

[5] *See* note 2 *supra*. In addition, CCNV chose the materials for the statue, a synthetic substance called "Design Cast 62" with which Reid had never before worked; Reid had initially proposed bronze. 2/2 Tr. 143-44, 147 (Reid). CCNV rejected Reid's idea to place the family's belongings in "suitcases" or "shopping bags" and directed him instead to construct the shopping cart. 652 F. Supp. at 1455 n.5 (App. 32a n.5). CCNV also rejected Reid's proposal to have the mother seated on the steam grate with the infant in her lap and the father standing behind; CCNV determined that all figures be placed in a recumbent position. *Id.*

In reaching its decision, the District Court focused upon the control that Petitioners had exercised over creation of "Third World America." The District Court concluded that Petitioners were the "motivating factor in the procreation" of "Third World America"; that they "not only conceived the idea" underlying the work, but "did so in starkly specific detail"; and that,

> while much was undoubtedly left to [Reid's] discretion . . . CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs.

652 F. Supp. at 1456 (App. 35a). As the District Court also found, Petitioners paid in full for the work "only when satisfied, upon delivery, that the statue did, indeed, convey the message they had intended for it." *Id.* at 1457 (App. 35a). The District Court rejected Reid's testimony that he had "reserved" copyright in the work and had retained "total [artistic] control" as being "without any corroboration" and "inconsistent with the tenor of the enterprise." *Id.* at 1455 n.3 (App. 31a n.3). Based upon the record, the District Court found that Petitioners "had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's 'control,' even the artist's." *Id.* (App. 31a n.3).

On appeal, Reid emphasized that he was not challenging the District Court's findings of fact.[6] Instead, Reid controverted the standard which the District Court utilized for determining whether a work is "made for hire." The Court of Appeals, after discussing the conflicting judicial interpretations of the work for hire doctrine under the Act, agreed with Reid's contention that

[6] *See* Br. for Appellant in Docket No. 87-7051 at 10 (D.C. Cir., filed November 20, 1987); Reply Br. for Appellant in Docket No. 87-7051 at 1 (D.C. Cir., filed January 19, 1988).

the proper standard was the one articulated by the Fifth Circuit in *Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc.* v. *Playboy Enterprises, Inc.*, 815 F.2d 323 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1280 (1988) ("*Easter Seal*")—specifically, that an artist is not an employee under the work for hire doctrine of the Copyright Act unless he or she is an employee under agency law. 846 F.2d at 1492-94 (App. 13a-19a). Applying factors set forth in Restatement (Second) of Agency § 220 (1958) (App. 37a), the Court of Appeals concluded that Reid was not CCNV's employee and, therefore, "Third World America" is not a work for hire. 846 F.2d at 1494 n.11 (App. 19a n.11).

The Court of Appeals expressly rejected the "sufficiently supervised and directed" standard set forth in *Aldon Accessories Ltd.* v. *Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982 (1984) ("*Aldon*"), and followed in *Evans Newton Inc.* v. *Chicago Systems Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, 107 U.S. 434 (1986) ("*Evans Newton*"). *See* 846 F.2d at 1489-91 (App. 8a-13a). The court made clear, however, that had it considered the *Aldon* standard to represent a proper interpretation of the Act, it would have affirmed the District Court below. *Id.* at 1497 n.18 (App. 25a n.18). The court also determined that "on the record thus far made," "Third World America" may qualify as a "joint work," the copyright in which Petitioners may share with Respondent or perhaps other parties. 846 F.2d at 1495-98 (App. 20a-26a). It remanded this case to the District Court for "comprehensive consideration" of the issues related to "joint works." *Id.* at 1499 (App. 28a).

REASONS FOR GRANTING THE WRIT

I. There Is A Direct And Acknowledged Conflict Among The Circuits Over The Proper Interpretation Of The Work For Hire Provisions Of The Copyright Act Of 1976

There is no question that the Second Circuit and the Seventh Circuit, on the one hand, and the Fifth Circuit and the District of Columbia Circuit, on the other, have reached conflicting interpretations of the work for hire provisions in the Copyright Act of 1976. This conflict is explicitly acknowledged by the Court of Appeals below and by the Fifth Circuit in *Easter Seal*. *See* 846 F.2d at 1487, 1489-94, 1497 n.18 (App. 2a, 8a-19a, 25a n.18); *Easter Seal*, *supra*, 815 F.2d at 328-34. The conflict arises, not in dicta, but from the bases of the courts' decisions.

Under the Second Circuit's analysis in *Aldon*, the critical inquiry is whether the hiring party "sufficiently supervised and directed" the creation of the work. 738 F.2d at 552. If the artist cedes such creative control to the hiring party, an employment relationship exists for copyright purposes, "even though the [artist] was not a regular or formal employee." *Id.*[7] The *Aldon* court recognized that *independent* contractors are not employees. "But that simply frames the issue: is the contractor 'independent' or is the contractor so controlled and supervised in the creation of the particular work by the employing party that an employer-employee relationship

[7] The court in *Aldon* found the work for hire doctrine applicable where the plaintiff conceived the idea of designing certain statuettes and then actively supervised the process by which overseas artisans produced them. In *Evans Newton* the Seventh Circuit upheld a lower court finding that a computer manual produced by defendants, on contract to plaintiff, was a work for hire; according to the court, plaintiff had "supervised and directed the work" while defendants "merely used their programming skills to produce the work according to [plaintiff's] specifications." 793 F.2d at 894.

exists." *Id.*[8] The *Aldon* standard, adopted by the Seventh Circuit in *Evans Newton*, *supra*, 793 F.2d at 894, is consistent with the standard which the courts applied under the 1909 Copyright Act work for hire doctrine. *See Aldon*, 738 F.2d at 552.[9]

The District of Columbia Circuit below and the Fifth Circuit in *Easter Seal* have taken a different view.[10] According to these courts, Congress, without expressly saying so, intended in the 1976 Act to "*radically* revise" the work for hire judicial doctrine that had developed under the Copyright Act of 1909. *Easter Seal*, *supra*, 815 F.2d at 330, 335 (emphasis in original); *see* 846

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[8] A work prepared by an independent contractor may be a work for hire if it meets the criteria set forth in the second subdivision of the Section 101 work for hire definition. *See* page 2 *supra*. The second subdivision defines a "work for hire" as a work "specially ordered or commissioned" if it comes within one of nine specific categories (not including sculptural works) and the parties have a written agreement designating it as a work for hire.

Petitioners do not contend that "Third World America" is a work for hire under subdivision two of the work for hire definition. They rely solely upon subdivision one, which defines a work for hire as a "work prepared by an employee within the scope of his or her employment."

[9] The majority in *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987), distinguished *Aldon* on its facts but did not controvert the Second Circuit's analysis. The *Aldon* standard has been followed by a number of district courts. *See Easter Seal*, *supra*, 815 F.2d at 333.

Certain artist groups were successful in getting a bill introduced into the 99th and 100th Congresses to overrule *Aldon*. However, neither of these bills has ever been reported out of committee. *See* S. 1223, 100th Cong., 1st Sess. (1987); S. 2330, 99th Cong., 2d Sess. (1986).

[10] The court in *Easter Seal* found the work for hire doctrine inapplicable where the plaintiffs had retained a television station to videotape a parade and "Dixieland jam session" staged by plaintiffs.

F.2d at 1487 (App. 2a) ("we rule that case law on works made for hire developed under the Copyright Act of 1909 . . . no longer holds sway"). The Fifth Circuit framed the standard, which it styled a "literal interpretation" of the 1976 Act, as follows:

> We hold that a work is "made for hire" within the meaning of the Copyright Act of 1976 if and only if the seller is an employee within the meaning of agency law, or the buyer and seller comply with the requirements of § 101(2).

815 F.2d at 334-35.[11] According to the Fifth Circuit, to determine whether an employment relationship exists under "agency law," courts should "consider the sort of factors set out in the Restatement [of Agency (Second) § 220 (1958)] . . . ." *Easter Seal*, *supra*, 815 F.2d at 335. Under the Fifth Circuit's approach, actual control and right to control are "relevant" but not determinative. *Id.* at 335-36.[12]

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[11] The court's reference to "§ 101(2)" means the second subdivision of the definition of "work made for hire" in Section 101 of the Copyright Act, 17 U.S.C. § 101. *See* note 8, *supra*.

[12] The Fifth Circuit in *Easter Seal* identified several district court decisions in which the "literal interpretation" was implicit in the courts' analyses. *See* 815 F.2d at 329.

The Fifth Circuit observed that certain district courts had adopted a third interpretation, which it styled the "conservative" approach. Under this interpretation, a work-for-hire analysis begins with a determination of whether the seller was an employee under Section 101(1). If the work was created at the instance and expense of the buyer, and the buyer had the right—whether exercised or not—to control the work, then the seller is an employee. If the seller is not an employee, the court determines whether the work qualifies as "for hire" under Section 101(2). *See Easter Seal*, *supra*, 815 F.2d at 331. This approach was adopted by the dissenting judge in *Brunswick Beacon, Inc.* v. *Schock-Hopchas Publishing Co.*, 810 F.2d 410, 414-15 (4th Cir. 1987) (Hall, J., dissenting).

II. The Outcome Of The Present Case Would Have Been Different Had The Court Of Appeals Below Adopted The Interpretation Of The Work For Hire Provisions Which Has Been Adopted By The Second And Seventh Circuits

A petition for writ of certiorari was filed last Term in the *Easter Seal* case, raising the same general issue as presented here. In response to the Court's request for the views of the United States, 56 U.S.L.W. 3338 (U.S. Nov. 10, 1987), the Solicitor General recommended denial of that petition, explaining:

> We agree that the courts of appeals have adopted conflicting interpretations and that the issue may well warrant resolution by this Court. In our view, however, the outcome of the present case would not have been different under a different interpretation of the work-made-for-hire provisions. Accordingly, the case is not an appropriate vehicle for resolving the issue on which the lower courts are divided.

Brief for the United States as Amicus Curiae at 6, *Easter Seal*, *supra*, No. 87-482 (March 1988) ("Amicus Brief").[13] On March 28, 1988 the Court denied the petition for writ of certiorari in *Easter Seal*. 108 S. Ct. 1280 (1988) (White, J., dissenting).

Unlike *Easter Seal*, the outcome of the present case would have been different had the Court of Appeals followed the approach set forth in *Aldon* and similar decisions. Indeed, the Court of Appeals expressly stated:

> [C]onflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

846 F.2d at 1497 n.18 (App. 25a n.18). This conclusion is amply supported by the findings of the District Court below which, focusing upon Petitioners' control over the creation of "Third World America," held in favor of Petitioners. *See* pages 6-7 *supra*. Clearly, therefore, the concerns that prompted the Solicitor General to recommend denial of certiorari in *Easter Seal* are not present here. To the contrary, this case does provide an "appropriate vehicle" to resolve the conflict among circuits concerning the work for hire doctrine.

III. The Conflict Among The Circuits Involves An Important Federal Issue Which Should Be Addressed By The Supreme Court; Numerous Lawsuits And A Variety Of Relationships Within The Copyright Community Are Directly Affected By The Proper Interpretation Of The Work For Hire Provisions

The "prevailing confusion" over the work for hire doctrine, 846 F.2d at 1497 (App. 25a), is a matter of significant concern not only to the parties here, but also to the entire copyright community. As one commentator has observed, "Because about forty percent of all copyright registrations are for works for hire, the interpretation of what is and is not a 'for hire' relationship governs thousands of dealings between artists, writers, and photographers on the one hand, and copyright using industries like publishing, music, and motion pictures on the other." Hardy, *Copyright Law's Concept of Employment—What Congress Really Intended*, 35 J. Copyright Soc'y 210, 210 (1988).

The classification of a work as "made for hire" is, as in this case, critical for purposes of identifying the copyright owner--and thus the party who may license that

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[13] The district court in *Easter Seal*, applying the *Aldon* standard, concluded that no employment relationship existed. *See* 815 F.2d at 333. On appeal, the Fifth Circuit rejected that standard but nevertheless affirmed the district court, observing: "The Easter Seal Society would probably lose on its claim that the field tapes were 'works made for hire' under any view of the 1976 Act." *Id.* at 336.

work to others.[14] Such a classification has other important consequences as well. For example, it affects the duration of the copyright in the work. Copyright normally endures for the life of the authors plus 50 years; copyright in a work for hire, however, lasts for 75 years from publication or 100 years from creation, whichever is shorter. 17 U.S.C. §§ 302(a), (c). Furthermore, Sections 203(a) and 304(c) of the Act, 17 U.S.C. §§ 203(a), 304(c), permit authors unilaterally to terminate transfers of rights in works after a specified period. *See generally Mills Music, Inc.* v. *Snyder*, 469 U.S. 153 (1985) (*"Mills Music"*). These termination rights, however, are not available if the work is a work for hire.

Because of the breadth of the parties and the issues affected by work for hire designations, there has been considerable litigation involving the question of whether a work is made for hire. Indeed, since the Act became effective in 1978, this question has arisen in more than twenty-five reported decisions.[15] As the Solicitor General noted in *Easter Seal*, "the issue on which the lower courts are divided is important . . . ." Amicus Brief at 8.[16]

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[14] As one American Bar Association ("ABA") section recently noted, the "conflict between *Aldon* and *Easter Seal* creates considerable geographic uncertainty about ownership rights." ABA Section of Patent, Trademark and Copyright Law, *Committee Reports* 377 (1988).

[15] In addition to the cases cited or referred to in notes 9 and 12 *supra*, *see, e.g.*, *Sandwiches, Inc.* v. *Wendy's International, Inc.*, 654 F. Supp. 1066 (E.D. Wis. 1987); *Iris Arc* v. *S.S. Sarna, Inc.*, 621 F. Supp. 916 (E.D.N.Y. 1985); *Peregrine* v. *Lauren Corp.*, 601 F. Supp. 828 (D. Colo. 1985); *Gallery House, Inc.* v. *Yi*, 582 F. Supp. 1294 (N.D. Ill. 1984); *Town of Clarkstown* v. *Reeder*, 566 F. Supp. 137 (S.D.N.Y. 1983).

[16] This case involves a broader question of whether Congress, in the Copyright Act of 1976, intended to displace certain judicial doctrine which had been developed under the Copyright Act of 1909. *See* pages 10-11, *supra*. The Fifth Circuit and the District of Columbia Circuit have concluded that Congress, without explicitly saying so, intended a "radical" departure from such judicial doctrine; the Second Circuit and the Seventh Circuit have concluded otherwise. Resolution of a conflict of this nature would seem to be especially within the province of this Court.

IV. The Interpretation Adopted Below Is Inconsistent With The Fundamental Policy Underlying The Work For Hire Provisions And Copyright Generally, And Is Not Supported By The Language Or Legislative History Of The Copyright Act of 1976

By focusing on the Restatement of Agency factors rather than on creative control to define the term "employee," the decision below reflects an erroneous interpretation of the Copyright Act of 1976, and should be reversed.[17]

1. The premise of the decision below—that the term "employee" in the work for hire provisions has a "literal" meaning—is itself flawed.[18] In *NLRB* v. *Hearst Publica-*

[17] Even if the work for hire provisions should be defined "literally" by reference to the Restatement of Agency § 220, the decision below cannot stand. Under Section 220(1) of that Restatement (App. 37a), control is not simply *a* "relevant" factor (*Eastern Seal*, 815 F.2d at 336); rather, it is *the* standard for determining the existence of an employment relationship. The various factors set forth in Section 220(2)—to which the Court of Appeals below and the Fifth Circuit in *Easter Seal* looked—are simply *some* of the factors which may be considered in determining whether the control standard is satisfied. But Petitioners clearly met the standard itself. *See* 846 F.2d at 1497 n.18 (App. 25a n.18); 652 F. Supp. at 1456-57 (App. 35a). At the very least, this case should have been remanded so that the relevant facts could have been developed and applied by the District Court below in light of the Court of Appeals' newly-announced standard.

[18] To the extent that the term "employee" has an accepted "literal" meaning, that meaning focuses on control. *See Black's Law Dictionary* 471 (5th ed. 1979) (defining "employee" as a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed"). *See also* note 17 *supra*.

tions, Inc., 322 U.S. 111 (1944), the Court rejected the argument that the term "employee," in the National Labor Relations Act ("NLRA"), may be defined by reference to common law factors as set forth in Restatement of Agency § 220. The Court explained that there is no "simple, uniform and easily applicable test" of employment under federal statutes. 322 U.S. at 120. Rather, the question of who is an "employee" for purposes of a particular federal law

> must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," . . . and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

322 U.S. at 124 (citations omitted).[19]

When viewed against the *Hearst* standard, the term "employee" in the work for hire provisions of the 1976 Act is properly defined by reference to creative control.

Indeed, the 1958 Copyright Office study which provided the genesis for the 1976 Act's work for hire provisions (*cf. Mills Music, supra*, 469 U.S. at 159-60) specifically explained the distinction between "employee" works and "commissioned" works in terms of such control:

> [T]he common law generally has differentiated between the employer-employee relationship and that

[19] Congress specifically amended the NLRA to overrule the holding in *Hearst Publications*, by providing that "general agency principles could not be ignored in distinguishing 'employees' from independent contractors." *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). The general approach to defining employment relationships, as set forth in *Hearst Publications* and quoted above, was not affected by such Congressional action. *See id.*; *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 891-92 (1984).

> of the parties to a contract for a commissioned product: in broad terms, the acts of an employee as such are imputed to his employer, but those of an independent contractor are not imputed to the person for whom he performs a special commission. *Underlying this distinction is the premise that an employer generally gives more direction and exercises more control over the work of his employee than does a commissioner with respect to the work of an independent contractor.* Perhaps in recognition of this principle, the statutory provisions in the United States regarding the employer's ownership of copyright in works made for hire, and the corresponding provisions in the copyright laws of several foreign countries, have not been extended to commissioned works generally.[20]

Similarly, when he recommended that Congress codify the 1909 Act's work for hire doctrine in the copyright revision legislation, the Register of Copyrights explained that this doctrine is predicated, in part, on the "ground" that the "work is produced on behalf of the employer and *under his direction*."[21]

Furthermore, the notion that the work for hire doctrine may be inapplicable where, as here, the hiring party

[20] Varmer, *Works Made for Hire and on Commission*, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. 123, 142 (Comm. Print 1960) (emphasis added).

[21] Register of Copyrights, Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the Copyright Law, 87th Cong., 1st Sess. 85 (Comm. Print 1961) ("1961 Register's Report"). The other "grounds" noted by the Register are that the "employee is paid for the work" and the "employer, since he pays all the costs and bears all the risks of loss, should reap any gain." *Id.*

It should be noted that an employment relationship may be found even where the employee volunteers his or her services. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.03[B], at 5-12 to 5-13 (1988) (citing authority).

exercises creative control is inconsistent with the purpose of the copyright clause of the Constitution, article I, section 8. As Judge Friendly has observed:

> It is often said . . . that the essential factor in applying the "work for hire doctrine" is "whether the employer possessed the right to direct and to supervise the manner in which the work was being performed." See Nimmer, Copyright § 62.2. *Where the employer in fact tells the employee pretty much what to do, vesting copyright in the former is wholly consistent with the policy of the Copyright Act since the creativity can be said to be primarily the employer's and the employee has simply carried out his instructions.*

Scherr v. *Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (dissenting opinion) (emphasis added).

2. The courts which construed the work for hire provision in the Copyright Act of 1909 properly focused upon creative control.[22] They made clear that "the hallmark of 'an employment for hire' relationship" under the 1909 Act is whether the hiring party "could have exercised the requisite power to control or supervise [the artist's] work." *Epoch Producing Corp.* v. *Killiam Shows, Inc.*, 522 F.2d 737, 744 (2d Cir. 1975), *cert. denied*, 424 U.S. 955 (1976). *Accord, Scherr* v. *Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (*citing* M. Nimmer, *Nimmer on Copyright* § 62.2 (1968)).[23] There is nothing in the

[22] Section 26 of the Copyright Act of 1909, ch. 320, 35 Stat. 1075, provided that "the word 'author' shall include an employer in the case of works made for hire." None of the terms in Section 26 was defined in the 1909 Act.

[23] During the 1963 discussion of the Register's draft legislation (*see Mills Music, supra*, 469 U.S. at 159), one industry spokesman noted:

> The cases do hold that "employment for hire" exists where there is a relationship of "master and servant," that is, where the person receives compensation and *is subject to control and regulation by the person for whom he performs the work.*

Preliminary Draft for Revised U.S. Copyright Law and Discussion and Comments on the Drafts, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, 274 (Comm. Print 1964) (emphasis added).

legislative history of the 1976 Act to indicate that Congress intended to jettison the control standard when it reenacted the work for hire doctrine. *Aldon, supra*, 738 F.2d at 552.

The court below attempts to discern such intent in the fact that the 1976 Act identifies the circumstances in which "specially ordered or commissioned" works qualify as works for hire. As noted above, a "work made for hire" is defined in Section 101 of the Act as *either*

1) a work "prepared by an employee within the scope of his or her employment"; *or*

2) a "specially ordered or commissioned" work which falls within one of nine specific categories if the parties agree in writing that the work is made for hire.

The second definition simply responds to those cases in which the courts had created a "presumption" that an independent contractor assigned his or her copyright to the hiring party and thus came within the work for hire doctrine.[24] It effectively reverses that presumption for the identified categories of commissioned works. It does not, however, either explicitly or implicitly, repudiate the control standard as a basis for distinguishing between "employee" works and "commissioned" works. *Aldon, supra*, 738 F.2d at 552.

The focus of Congressional concern can be seen in *Scherr* v. *Universal Match Corp.*, 417 F.2d 497 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970). There, the

[24] *See Brattleboro Publishing Co.* v. *Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966); *Yardley* v. *Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939), *cert. denied*, 309 U.S. 686 (1940).

Second Circuit held that the copyright in a statue made by plaintiffs belonged to the Government under the work for hire doctrine. The court advanced two separate rationales for this result. First, it reasoned that the statue was a work for hire under the line of cases establishing a presumption that copyright rests in a commissioning party. 417 F.2d at 500. Second, and alternatively, it found the existence of an employment relationship relying upon the control standard. *Id.* at 500-01. The 1976 Act forecloses the former, but not the latter, approach.

3. The court below discerns support for its interpretation in "legislative history" evidencing Congress' "general concern" for "creators." 846 F.2d at 1494 (App. 18a). To the extent that the court equates "creators" with "artists" rather than those who exercise creative control, its position is not supported by the legislative history surrounding the work for hire provisions.

The House Report states that Congress did not intend to change the fundamentals of the work for hire doctrine, but rather to adopt what it considered "one of the basic principles" of the 1909 Act: "that in the case of works made for hire the employer is considered the author of the work. . . ." *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 121 (1976). There is no indication whatsoever that Congress intended to expand the rights of artists at the expense of the rights of employers. Indeed, Congress rejected artists' proposals, such as the "shop right" doctrine of patent law, which would have granted employers lesser rights than are granted to other authors under the Act. *See id.* Congress also rejected the Register of Copyright's recommendations to designate employers as mere "owners" of copyright and to exclude from coverage all commissioned works. *See* 1961 Register's Report at 86-87. Instead, Congress reaffirmed employers' status as legal "authors" and included nine categories of "commissioned" works that may qualify as works made for hire.

In short, there is no evidence in the legislative history of greater Congressional "concern" for artists than for others who exercise the creative control over a work. Such a bias would, in fact, be contrary to the basic principles of the work for hire doctrine and inconsistent with the Constitutional purpose of copyright law—to encourage the creation and broadest public availability of creative works. *See Sony Corp.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 428-29 (1984); *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). An employer's ability and incentive to maximize such availability is typically greater than an artist's; the rights granted to the creative force behind a work should be the same whether the true creator is an artist or an employer.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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August 17, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 87-7051

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*

v.

JAMES EARL REID,
Appellant.

Argued Jan. 29, 1988

Decided May 20, 1988

As Amended May 20 and May 31, 1988

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 86-01507)

Robert S. Schlossberg, with whom William L. Gardner and Grace E. Speights, Washington, D.C., were on the brief, for appellant.

Terri A. Southwick, of the bar of the Court of Appeals of the District of Columbia, pro hac vice, by special leave of Court, with whom Timothy D. Junkin and L. Barrett Boss, Washington, D.C., were on the brief, for appellees.

Charles D. Ossola, Washington, D.C., for amicus curiae, The Copyright Justice Coalition.

Before MIKVA, RUTH BADER GINSBURG, and SILVERMAN, Circuit Judges.

Opinion for the Court filed by Circuit Judge RUTH BADER GINSBURG.

RUTH BADER GINSBURG, Circuit Judge:

This case calls for interpretation of the "work made for hire" prescriptions of the Copyright Act of 1976 (1976 Act), 17 U.S.C. §§ 101, 201 (1982).[1] The issue is novel in this circuit and has divided sister courts. *Compare Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323 (5th Cir.1987), *cert. denied*, —— U.S. ——, 108 S.Ct. 1280, 99 L.Ed.2d 491 (1988), *with Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984), and *Evans Newton Inc. v. Chicago Sys. Software*, 793 F.2d 889 (7th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986).

In the case at hand, the district court held the work for hire doctrine applicable and rested its judgment for the plaintiff on that doctrine. Following the path marked by the Fifth Circuit, we rule that case law on works made for hire developed under the Copyright Act of 1909 (1909 Act) no longer holds sway; in accord with *Easter Seal Society*, 815 F.2d at 324, we conclude that the "1976 Act has greatly restricted the scope of the 'work for hire' doctrine." Based on the construction we hold proper under the current Act, we reverse the district court's judgment and remand the instant case for further proceedings.

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[1] The expression in the statute is "work made for hire." We employ here interchangeably the shorter term, "work for hire."

I.

Plaintiff-appellee in this case, the Community for Creative Non-Violence (CCNV), is a Washington, D.C.-based non-profit unincorporated association devoted to the welfare of homeless people. In the fall of 1985, CCNV decided to participate in the annual Christmas Pageant of Peace in D.C. by sponsoring a display that would dramatize the plight of the homeless. As the district court recounted, Mitch Snyder, CCNV's agent and trustee (also named as a plaintiff-appellee in this action), and other CCNV members

> conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Community for Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C.1987).

Snyder contacted James Earl Reid, a Baltimore sculptor and defendant-appellant herein; in the course of two telephone calls in October 1985, CCNV and Reid reached an agreement. Reid promised to sculpt the three human figures for "Third World America" and a shopping cart containing their meager belongings; he agreed to use a synthetic substance called "Design Cast 62" that could be tinted to resemble bronze. CCNV assumed responsibility for the steam grate and the pedestal. For a total outlay

of approximately $7,000-$8,000, CCNV engaged a cabinet-maker to construct the pedestal, obtained the special-effects equipment from a company in California, and acquired the chemicals needed to produce the simulated steam from Mobil Oil Company in New Jersey. The parties agreed that Reid's portion of the sculpture would cost no more than $15,000, not counting the sculptor's own services, which Reid donated to the venture; they further agreed that Reid's work would be delivered to CCNV by December 12 for attachment to the base preparatory to display of the total creation in the Pageant. Neither party mentioned copyright.

Reid and his assistants worked on the figures for the sculpture throughout November and December, conferring from time to time with various CCNV members and making changes to the form and arrangement of the figures to accommodate CCNV's requests. On December 24, 1985, Reid delivered his portion of "Third World America" to D.C. where it was joined to the steam grate pedestal and placed on display near the site of the Pageant. At that time, Reid received $3,000 from Snyder, the final installment of the $15,000 total payment due to him under the agreement.

In late January 1986, CCNV sent the entire sculpture to Reid so that he could repair damage to the foot of the male figure that occurred in the original transportation from Baltimore to D.C. The following month, CCNV began making plans to take the sculpture on a tour of several cities to raise money for the homeless. Reid objected to the planned tour insisting that the Design Cast 62 material was too delicate to withstand the ambitious itinerary; he urged CCNV to cast "Third World America" in bronze or to have a "master mold" made. CCNV declined to fund these additional undertakings but invited Reid to do so at his own expense.

In March 1986 CCNV asked Reid to return the sculpture; Reid refused. He filed a certificate of copyright

registration for "Third World America" in his own name on March 20, 1986,[2] and announced his own plans to take the sculpture on an exhibition tour more moderate than the one CCNV had projected. Snyder filed a competing certificate of copyright registration in his name on May 21, 1986.[3] On June 2, 1986, CCNV commenced this litigation against Reid. The complaint sought return of the sculpture and a determination of copyright ownership. On July 25, 1986, the district court granted a preliminary injunction ordering Reid to return the sculpture to CCNV. On February 9, 1987, after a two-day bench trial, the district court declared "Third World America" a work made for hire whose copyright is owned exclusively by CCNV. Reid timely appealed that final decision.

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[2] Beneath the title of the sculpture, which was molded into the human figure portion of the work, Reid had placed a copyright notice: "© James Earl Reid, Sculptor 85." This measure, which Reid took before the creation was displayed in D.C., *see* 652 F.Supp. at 1455 n.7, was unnecessary to secure any copyright protection to which Reid might be entitled. Generally, a notice of copyright is required upon publication of copies of a copyrighted work. 17 U.S.C. § 401(a). However, a public display is not a publication. 17 U.S.C. § 101 ("A public performance or display of a work does not of itself constitute publication.").

[3] Snyder filed the certificate of copyright registration in his own name without mentioning CCNV. The district court indicated, however, that Snyder's registration was as CCNV's trustee. *See* 652 F.Supp. at 1457 (declaring copyright vested "in Mitch Snyder, trustee, for the use and benefit of the Community for Creative Non-Violence"). On the prudence of this filing in light of the voluntary and unincorporated nature of CCNV, *see Motta v. Samuel Weiser, Inc.*, 768 F.2d 481 (1st Cir. 1985) (where membership of unincorporated association is too fluid, association is not capable of owning property). For convenience, we will refer to CCNV as the plaintiff-appellee and putative author of "Third World America."

II.

The 1976 Act prescribes that copyright ownership[4] "vests initially in the author or authors of the work," and that "authors of a joint work are coowners of copyright in the work." 17 U.S.C. § 201(a). As to a work made for hire, the Act provides that

> the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

17 U.S.C. § 201(b). "Work made for hire" is defined in the Act as

> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use [1] as a contribution to a collective work, [2] as a part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.
>
> . . .

[4] The dispute between CCNV and Reid concerns only ownership of *copyright* in "Third World America," not ownership of the sculpture itself. *See* 17 U.S.C. § 202 (ownership of copyright is distinct from ownership of material object). Having paid Reid the agreed price of $15,000, CCNV owns the sculpture. Ownership of a particular copy of a copyrightable work—in this case the original "copy," *see* 17 U.S.C. § 101 ("[t]he term 'copies' includes the material object . . . in which the work is first fixed")—vests certain rights under the 1976 Act in that owner. Among these are the right to "sell or otherwise dispose of the possession of that copy" and the right to "display that copy publicly." 17 U.S.C. § 109(a), (c). In light of this distinction between ownership of a particular copy and ownership of a copyright, Reid's retention of the sculpture —the behavior that precipitated CCNV's plea for a preliminary injunction—lacked legal foundation. Even if Reid had solely owned the "Third World America" copyright, CCNV's exclusive ownership of the sculpture itself would have left Reid with no right to possess that material object. *See infra* pp. 1498-99.

17 U.S.C. § 101 (numbers in brackets added). Our task is to determine where the contending parties fit within this statutory framework, specifically, is Reid an "author" of the sculpture "Third World America," as that term is used in the section on ownership of copyright, § 201, or is CCNV the only party "considered the author"? The provision in § 101 defining "work made for hire" is key to this inquiry.

The first subpart of the § 101 "work made for hire" definition concerns work prepared in an "employment" setting; the second concerns works "specifically ordered or commissioned." Does the distinction Congress made between "employment" in § 101(1) and "commissioned" work in § 101(2) mean, the Fifth Circuit asked in *Easter Seal Society*, 815 F.2d at 328, that the work of an independent contractor can be placed in the "work made for hire" category only when the work is of a type § 101(2) describes in its nine tightly-drawn categories (and, even then, only when the parties so agree)? The Fifth Circuit, in disagreement with the Second and Seventh Circuits, answered this question affirmatively.[5] We set out below the conflicting interpretations advanced in recent circuit decisions, align ourselves with the Fifth Circuit's position, and then consider whether "Third World America" may qualify as a joint work of art, with copyright in the work co-owned by two or more authors. *See* 17 U.S.C. § 101 (definition of "joint work").

[5] In *Brunswick Beacon, Inc. v. Schock-Hopchas Publishing Co.*, 810 F.2d 410 (4th Cir. 1987), the Fourth Circuit, although rejecting the specific work for hire assertion there at issue, indicated its agreement with the Second Circuit.

A. The Second and Seventh Circuit Interpretation

The 1909 Act defined the word "author" to include an employer in the case of works made for hire, 17 U.S.C. § 26 (repealed 1976), but did not further delineate the "work made for hire" domain. Case law interpreting that Act treated expansively the relationships that qualified under the employer-employee rubric; a test of actual control by the commissioning party slackened to become a right to control (even if not exercised) standard. Ultimately, a firm presumption developed under which virtually "any person who paid another to create a copyrightable work" counted as the statutory "author" within the compass of the work for hire doctrine. *See Easter Seal Society*, 815 F.2d at 327; *see generally* Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U.PA.L.REV. 1281, 1282-89 (1987). First among the federal courts of appeals to consider what change the 1976 Act had wrought in the work for hire domain, the Second Circuit, in *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984), held that only a modest alteration had been made: Congress had corrected exorbitant case law that "worked an injustice in those situations where the contracting party did all of the creative work and the hiring party did little or nothing." 738 F.2d at 552.

Aldon Accessories noted the two subsections of the statutory (§ 101) "work made for hire" definition, and emphasized the first subsection: "a work prepared by an employee within the scope of his or her employment." That subsection, according to the Second Circuit, retains in place prior case law ranking as "employees" whose labors yield works for hire "[independent] contractors who were actually sufficiently supervised and directed by the hiring

party." *Id.*[6] Under *Aldon Accessories*, if there is the requisite supervision and control, the commissioning party is deemed the author and sole owner of copyright in the work.[7]

In more cryptic statement, *Aldon Accessories* addressed the second subsection of § 101's "work made for hire" definition, the subsection delineating nine categories of "specially ordered or commissioned" works. Assuming the

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[6] Doubtless, the *Aldon Accessories* court intended to apply the "actually sufficiently supervised and directed" test only to determine whether independent contractors are employees. The copyrightable work of "regular or formal" employees is work made for hire without regard to the employer's exercise of control. *See Easter Seal Society*, 815 F.2d at 334 ("Under *Aldon Accessories*, a court must still determine whether the [creator of the copyrightable work] was an employee or independent contractor because the [actual control] test applies only to independent contractors.").

[7] The attribution under the work for hire doctrine of authorship as well as ownership of the copyright yields significantly more than would acquisition of copyright ownership alone. The copyright of a work made for hire on or after January 1, 1978 "endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first." 17 U.S.C. § 302(c). Ownership of copyright alone, which would occur upon an author's grant of a transfer or license of copyright, leaves the author with a right to terminate the grant in 35 or 40 years. *See* 17 U.S.C. § 203(a)(3). Book publishers and motion picture producers had strongly opposed complete exclusion of commissioned works from work for hire treatment in the 1976 Act; their concern focused on the author's termination right exercisable "[i]n the case of any work other than a work made for hire," 17 U.S.C. § 203(a). *See* Hamilton, *supra*, 135 U.PA.L.REV. at 1292 (capping discussion with pointed observation that "the creator of a work made for hire . . . could never terminate the employer's right to the work"). The consequences in foreign jurisdictions of recognizing the commissioned rather than the commissioning party as author also figured in the legislative debates. *See* Angel & Tannenbaum, *Works Made for Hire Under S.22*, 22 N.Y.L. SCH.L.REV. 209, 213-14 (1976); *see generally* 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 5.03[A] (1985) (significance of work for hire status).

absence of the supervision-by-hiring-party ingredient, *Aldon Accessories* recognized that the independent contractor in these situations is sole author and copyright owner unless, as § 102(2) stipulates, "the parties expressly agree in a written instrument signed by them that the work should be considered a work made for hire." *Aldon Accessories* did not home in on the case of the independent contractor who is not "sufficiently supervised and directed by the hiring party," but whose commissioned work is not within the nine categories set out in § 101's second subsection.

We pause here to observe that unlike the instant case, in which artist and commissioning party vie for ownership of a copyright, *Aldon Accessories* pitted the commissioning party (to boot, a genuinely creative participant) against a third-party infringer (and a blatant one at that). Plaintiff Aldon Accessories Ltd. (Aldon) was in the business of designing and marketing decorative objects. In 1977, one of Aldon's two principals conceived of a novel line of statuettes depicting mythical creatures, notably a Pegasus and a unicorn. Aldon first commissioned a Japanese firm to aid in the design of the figurines and to produce the creations in porcelain. Some two years later, Aldon commissioned a Taiwanese firm to produce brass versions of the statuettes. In 1980, Aldon filed certificates of copyright registration for the statuettes; Aldon listed itself as the author but indicated that the works were "made for hire." In 1981 a buyer for Spiegel, Inc. (Spiegel) saw Aldon's brass unicorn at a gift show. At the Spiegel buyer's request, Aldon sent samples. By mid-1981, Spiegel was selling through its catalog brass unicorns identical to Aldon's. Aldon sued Spiegel for copyright infringement.

On appeal from a judgment for Aldon, Spiegel argued that the statuettes could not be works made for hire under the 1976 Act because statuary does not fall into one of the nine categories enumerated in the second subsection of the § 101 definitional provision. Therefore Aldon could not be the author and copyright owner of the brass unicorn, Spiegel contended, and could not sue for copyright infringement. Understandably, Spiegel's argument did not succeed.

The record in *Aldon* demonstrated the very active participation of Aldon's principal every step of the way, from conception of the statuettes to "[standing] over the artists and artisans at critical stages of the process, telling them exactly what to do." 738 F.2d at 553 (commenting that "in a very real sense," Aldon's principal "was the artistic creator"). In this light, Spiegel's liability for infringement could have been upheld by recognizing Aldon as at least "a co-author of the work" and, as joint owner of the copyright, one clearly "entitled to bring and win an action for infringement against a third party." *Easter Seal Society*, 815 F.2d at 333; *cf. Mister B Textiles Inc. v. Woodcrest Fabrics, Inc.*, 523 F.Supp. 21, 24 (S.D.N.Y.1981) (rejecting, upon finding co-authorship, infringer's objection that plaintiff commissioning party did not own the copyright).[8]

Two years after the Second Circuit's decision, the Seventh Circuit adopted the *Aldon Accessories* "sufficiently supervised and directed" test; in *Evans Newton*

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[8] Hamilton, *supra*, at 1302-03 & n. 118, suggests additional ways of viewing the *Aldon Accessories* situation. One might regard Aldon as sole author and owner of the copyright (Henry Moore, for example, engaging others to execute his fine art). The foreign producers thus could be seen as simply instrumental (Hamilton's analogy is the stenographer recording lines dictated by a poet). Or, the brass statuettes could be regarded as derivative of the porcelain works made in 1977 and thus subject to the 1909 Act, which remained in force until 1978, an act courts ever more certainly construed to sweep commissioned works broadly into the work for hire domain. *See supra* p. 1489; *see also* Hamilton, *supra*, at 1301 n. 112 (indicating that the Japanese and Taiwanese contractors might not have been positioned to assert protection in the U.S. against copiers of the statuettes).

Inc. v. Chicago Sys. Software, 793 F.2d 889 (7th Cir.), *cert. denied*, —— U.S. ——, 107 S.Ct. 434, 93 L.Ed.2d 383 (1986), the court relied on *Aldon Accessories* to affirm a judgment of infringement against an independent contractor commissioned by the plaintiff to develop a software program. The contractor, after completing work for the plaintiff, attempted to market a competing program. In defense of its conduct, the contractor claimed it was a co-author and co-owner of the copyrighted work, and therefore could not be an infringer.

The parties in *Evans Newton* had not "expressly agree[d] in a written instrument signed by them" that work would constitute a "work made for hire," 17 U.S.C. § 101, nor was a software program even in the § 101(2) catalog, and the court accepted the contractor's assertion that work for hire status within § 101's definition therefore turned on a characterization question: was the contractor an "employee"? *See* 793 F.2d at 893. On that question, *Aldon Accessories* instructed that the commissioning party's "supervision and direction" of the contractor was decisive. "The evidence at trial" on the point "essentially came down to a credibility contest," the court of appeals said, so that the district court's finding of sufficient supervision could not be held "clearly erroneous." *Id.* at 894.

The evidence of "actual control" in *Evans Newton*, it has been observed, was less compelling than the showing of constant direction of the work in *Aldon Accessories*. *See Easter Seal Society*, 815 F.2d at 334 ("[T]he 'actual control' test of *Aldon Accessories* . . . slides too easily into the vague and expansive 'right to control' test, as the decision in *Evans Newton* may portend."). In the cases before us, we note that the district court, while citing *Aldon Accessories* and examining with care CCNV's interactions with Reid, used language harking

back to the "payor presumed to control" approach that evolved under the 1909 Act. The district court wrote: "If the putative 'employer' was either the 'motivating factor' in the production of the work, or possessed the *right* to 'direct and supervise' the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee." *Community for Creative Non-Violence v. Reid*, 652 F.Supp. at 1456 (emphasis added).

B. *The Fifth Circuit Interpretation*

The Fifth Circuit panel in *Easter Seal Society* confronted and comprehensively explored this stated issue: "What effect, if any, did the Copyright Act of 1976 have on the 'work for hire' doctrine developed under the 1909 Act?" 815 F.2d at 324. The *Easter Seal Society* opinion first surveys the work for hire precedent that evolved under the 1909 Act, and then identifies and discusses three distinct interpretations of the 1976 Act. 815 F.2d at 328.

The Fifth Circuit panel presented first a position it designates the "literal interpretation." Summarily stated. that interpretation reads section 101

> as a reflection of a simple dichotomy in fact between employees and independent contractors. In other words, a court should first determine—using agency law rules—whether or not the seller is an employee or an independent contractor. Then, the court should apply the statute. Section 101(1) applies to sellers who are employees. If the work was in the scope of employment, an agency-law employee is a copyright employee, and the employer is the "author." Section 101(2) applies to independent contractors. All works by independent contractors—"work[s] specially ordered or commissioned"—are *not* works for hire unless the work comes within the nine nar-

> row statutory categories *and* parties agree in a signed instrument. Section 101(2) is really statutory *permission* for certain kinds of independent contractors to give "authorship" to their buyers.

Id. at 329 (footnote omitted).[9] As the Fifth Circuit noted, the enumeration in subsection (2) affords telling support for the literal interpretation, for a common thread unites the nine precisely-defined categories: "All involve situations where, in addition to owning the copyrights in the works by contract, it would be very useful for [commissioning parties] to be able to become statutory 'authors.'" *Id.*[10]

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[9] The Fifth Circuit employs the terms "buyer" and "seller" throughout its opinion. "A 'buyer' is the putative legal employer claiming ownership under the 'work for hire' doctrine"; "a 'seller' is the person against whom a buyer claims, whether an employee or an independent contractor." *Easter Seal Society*, 815 F.2d at 329. We have employed, in place of the Fifth Circuit's "buyer" and "seller," the terms "commissioning party" and "commissioned party" or "independent contractor."

[10] CCNV argues that Reid should be precluded from urging before this court the Fifth Circuit's interpretation of the work for hire doctrine because he relied on the Second Circuit's view of the doctrine before the district court. CCNV incompletely portrays the record. The Fifth Circuit decision in *Easter Seal Society* had not yet issued at the time of the district court's decision in this case, but Reid in fact tendered to the district court an alternate position on all fours with the one thereafter announced in *Easter Seal Society*. In his Answer, for example, Reid asserted that "the sculpture is not a 'work for hire' in that [Reid] was never an employee of [CCNV], and that under the [1976 Act] the subject matter of the work did not come within the purview of the designated categories of [17 U.S.C. § 101(2)]. . . ." Answer to Complaint for Declaratory Judgment ¶ 8. Similarly, in his Pre-Trial Statement, Reid maintained that he is not an employee, that no written agreement figures in this case, and that the work at issue does not fall within the nine categories enumerated in § 101(2). Defendant's Pre-Trial Statement at 7-8. These passages, one need not strain to recognize, advance the "literal interpretation."

We are particularly impressed by scholarly commentary on the legislative history of the 1976 Act and the almost unanimous support that commentary provides for the literal interpretation. *See* W. PATRY, LATMAN'S THE COPYRIGHT LAW 122 (6th ed. 1986) ("Congress adopted the Copyright Office's intent to limit the types of works created by independent contractors that could be deemed works made for hire to the specified examples given in the second subdivison of the statutory definition, ensuring that, contrary to some decisions construing Section 26 of the 1909 Act, works made for hire within the meaning of the 'first' definition would be limited to salaried or like employees and would *not* include independent contractors even if their work was closely supervised or controlled. The second subdivision of the 'work made for hire' definition was thus intended to be the exclusive provision governing works created by independent contractors.") (footnote omitted); A. LATMAN, R. GORMAN, & J. GINSBURG, COPYRIGHT FOR THE EIGHTIES: CASES AND MATERIALS 242 (2d ed. 1985) ("[D]id the [*Aldon Accessories*] court improperly blur an attempted statutory distinction between works created by 'employees' and 'specially ordered or commissioned works,' a distinction designed by Congress to give commissioned persons greater copyright ownership rights than they had under the 1909 Act cases?"); Fidlow, *The "Works Made for Hire" Doctrine and the Employee/Independent Contractor Dichotomy: The Need for Congressional Clarification*, 10 HASTINGS COMM/ENT L.J. 591 (1988); Hamilton, *supra*, at 1292-93 ("[F]rom a preliminary draft that excluded all commissioned works from the work-made-for-hire rubric, the copyright law revision developed into a final bill wherein only certain, specified categories of commissioned works could be considered as works made for hire.") (footnote omitted); Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 900-01 (1987); Note, *The Freelancer's Trap: Work*

for Hire Under the Copyright Act of 1976, 86 W. VA. L. REV. 1305, 1321 (1984) ("With regard to works prepared on special order or commission, the . . . definition [of the 1976 Act], which alters completely the status of commissioned works, represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered works made for hire under certain circumstances.") (footnote omitted); *see also* 1 M. NIMMER & D. NIMMER, *supra* note 8, § 5.03[B][2][a], at 5-18 (apparently supporting the literal interpretation but attempting to reconcile contradictory cases); Angel & Tannenbaum, *supra* note 8, at 293 (writing in support of literal interpretation at time 1976 Act was enacted). *But see* O'Meara, *"Works Made for Hire" Under the Copyright Act of 1976—Two Interpretations*, 15 CREIGHTON L. REV. 523 (1982) (supporting conservative interpretation discussed *infra*).

The Fifth Circuit referred next to the "conservative interpretation," one that preserves in large part the work for hire doctrine developed under the 1909 Act. *See* 815 F.2d at 331. The critical questions for the "conservative interpretation" are whether the work was created at the commissioning party's "instance and expense," *id.* at 327, and whether that party "had the *right* to direct and supervise the manner in which the work was being performed." *Id.*, quoting *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir.1978) ("Actual exercise of [the] right [to direct and supervise the manner in which the work was being performed] is not controlling, and copyright is vested in the employer who has no intention of overseeing the detailed activity of any employee hired for the very purpose of producing the material."); *see also Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir.1969) (same), *cert. denied*, 397 U.S. 936, 90 S.Ct. 945, 25 L.Ed.2d 116 (1970). Under this reading, section 101 carves out a set of very narrow exceptions to the broad "right to control" test, *i.e.*, the familiar right

to control test holds sway for all but the nine categories of commissioned works enumerated in subsection (2); for works falling within these categories the statute requires a written agreement to make the commissioning party the author and exclusive owner of the copyright. The district court in the case before us did not distinguish the *Aldon Accessories* "actually sufficiently supervised" interpretation from this conservative "right to supervise" interpretation. Citing *Aldon Accessories* in conjunction with *Murray v. Gelderman*, the district court homogenized the two interpretations, *see* 652 F.Supp. at 1456, just as courts and commentators had blended these readings during the evolution of the work for hire doctrine under the 1909 Act.

The Fifth Circuit commented that the "[conservative] interpretation, unlike the 'literal' one, makes the nine narrow categories in § 101(2) completely mysterious." *Easter Seal Society*, 815 F.2d at 331. Why would Congress want to afford a translator, for example, shelter from an expansive "work for hire doctrine" that leaves a sculptor or a composer unprotected, the *Easter Seal Society* panel asked. The § 101(2) enumeration does make sense, in the context of the "literal interpretation," *Easter Seal Society* observed, because the activities listed "look like the kind of activities where the buyer normally wants and needs to be a statutory author in order to gain complete initial ownership of a collaborative project." *Id.*

Finally, the Fifth Circuit examined as a "third view" the *Aldon Accessories* "actually sufficiently supervised and directed" test, discussed *supra*. Summarizing its examination, the *Easter Seal Society* court listed four problems with the *Aldon Accessories* approach:

> (1) the [actual control] rule is unnecessary in cases where "work for hire" is raised by the defendant to question the validity of the plaintiff's copyright since any plaintiff who actually controls an inde-

> pendent contractor will be a co-author of the work; (2) it makes the outcome of "work for hire" analysis too fact-specific for each work and therefore less predictable by buyers and sellers; (3) it does not eliminate the need for a determination of employee versus independent contractor since the "actual control" test applies only to independent contractors; (4) it slides too easily into the vague and expansive "right to control" test, as the decision in *Evans Newton* may portend.

Id. at 334.

In settling on the literal interpretation as most consistent with the language, history, and policies of the 1976 Act, the *Easter Seal Society* court mentioned two factors that gave it pause. First, the Fifth Circuit panel underscored this § 201(b) language: "In the case of a work made for hire, the employer *or other person for whom the work was prepared* is considered the author for purposes of this title. . . ." Under the literal interpretation, the *Easter Seal Society* court observed, those words are operative only as to the narrow class of non-employer commissioning parties "who can be authors by compliance with the requirements of § 101(2)." 815 F.2d at 330. We agree that the § 201(b) words draw their meaning from § 101, but we do not think that factor renders the literal interpretation problematic.

Second, the Fifth Circuit expressed some doubt whether "Congress intended to *radically* revise 'work for hire' doctrine." *Id.* (emphasis in original). We are less doubtful on that score as well. The legislative history, as cogent commentary recounts, *see supra* pp. 1492-93, reveals both a general concern that creators receive fair recompense and a specific decision, set down in § 101, to separate commissioned works from works made in an employment setting. *See particularly* Hamilton, *supra*, at 1290-94 (observing, *inter alia*, at 1293, that "the amount

of deliberations that went into enumerating which types of commissioned works could be treated like employee-created works made for hire indicates that Congress intended for there to be a meaningful distinction between employee-created and commissioned works," thus case law on works made in an employment context "could remain viable," but 1909 Act precedent "relating to commissioned works could not").

Satisfied that the literal interpretation is the one that best suits the 1976 Act, we hold that a copyrightable work of an independent contractor cannot be a work made for hire under the current Act unless that work falls within one of the specific categories enumerated in § 101(2) *and* "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. § 101(2). It follows from this that "Third World America" does not qualify as a work made for hire, for Reid was an independent contractor and not an employee of CCNV within the rules of agency law;[11] furthermore, sculpture surely is not a category of commissioned work enumerated in § 101(2), and no written agreement existed between CCNV and Reid.

With the work for hire doctrine removed from the case, we turn to the proper resolution of this controversy.

III.

CCNV sought a declaration of copyright ownership. We have held that CCNV is not author of a work made for hire and see no other basis for a claim that CCNV is sole owner of copyright in "Third World America."

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[11] Reid, a fine artist, donated his services, worked in his own studio, and personally engaged assistants when he needed them. Creating sculptures was hardly "regular business" for CCNV. Given these matters of fact, *see* Restatement (Second) of Agency § 220 (1958), we think it evident that Reid was not CCNV's employee, nor do we understand CCNV to contend otherwise.

But neither does the existing record bear out Reid's assertion that he is the exclusive owner of copyright in the work. The facts thus far found by the district court, however, indicate that "Third World America" may indeed qualify as a joint work. To guide the district court on remand, we set out here the relevant statutory prescriptions and relate them to the record as it now stands.

"Copyright in a work . . . vests initially in the author or authors of the work." 17 U.S.C. § 201(a); "[t]he ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . ." 17 U.S.C. § 201(d)(1). Neither side contends that any conveyance or operation of law has effected a transfer of copyright ownership in the work in question, thus a determination of authorship of the sculpture will constitute simultaneously a determination of copyright ownership.

"Ownership of a copyright," the 1976 Act states, "is distinct from ownership of any material object in which the work is embodied." 17 U.S.C. § 202. "Transfer of ownership in any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object;[12] nor, in the absence of an agreement, does transfer of ownership of a copyright . . . convey property rights in any material object." *Id.* Because material object and copyright do not travel together unless the parties so arrange, Reid's transfer of the "Third World America" figures to CCNV left copyright ownership of the work unaffected.

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[12] The 1976 Act thus definitively rejects the common law presumption, *see Pushman v. New York Graphic Soc., Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942), that an artist sells the copyright upon sale of the material object. *See also* 17 U.S.C. § 204(a) (written instrument required to convey copyright); 17 U.S.C. § 301(a) (preemption of state common and statutory law).

"Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ." 17 U.S.C. § 102(a) (§ 102(a)(5) lists as "[w]orks of authorship" "pictorial, graphic, and sculptural works"). The sculpture in question, it is evident, qualifies for protection as an "original work of authorship." *See, e.g., Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir.1951) ("'Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.' No large measure of novelty is necessary.") (footnote omitted). We consider it plain as well that, intense as CCNV's participation in the project may have been, Reid, as sculptor, contributed more than a minimal amount of creativity to "Third World America." That is enough, once the work for hire doctrine is out of the picture, to render him an author of a protected work.[13] Indeed, Reid contends he is the sole author and exclusive owner of the copyright. We now state why the record before us does not establish that contention.

The idea to be expressed in the work, as the district court indicated, remained constant from the time Snyder and fellow CCNV members first conceived it: the sculpture was to depict "homeless people huddled on a street-side steam grate." 652 F.Supp. at 1454. Reid asserts no large role in the creation of the special effects pedestal designed to simulate a grate emitting steam. CCNV hired a cabinetmaker to construct the steam grate pedestal portion of the sculpture and obtained the special-effects equipment from sources in Hollywood. Thus Reid cannot possibly have solely "authored" the steam grate portion of the sculpture. Reid so recognizes; however, he ques-

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[13] In this regard, we reject the district court's suggestion that Reid may have played a purely instrumental role in the creation of "Third World America." *See* 652 F.Supp. at 1456 (CCNV "engaged Reid to utilize his representational skills, rather than his original artistic vision. . . .").

tions whether CCNV is the author of the base, and whether the base is copyrightable.

The 1976 Act defines a joint work as one "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." 17 U.S.C. § 101. "Third World America," on the record thus far made, fits that description.[14] From the original conception of the work through its completion for display on Christmas Eve 1985, "the modern Nativity scene" appears to have been treated by those who labored to create it as a unitary whole. *See* 652 F.Supp. at 1454. This much, at least, is undisputed: Reid constructed the figures so that they would huddle on, and could be affixed to, the steam grate pedestal; and once the whole was composed, it was not disassembled. CCNV transported the entire work to Reid in January 1986 for the needed repair. Similarly, in March 1986, when CCNV demanded the return of "Third

[14] Reid objects to our consideration of CCNV's suggestion that it is "*at the very least* joint owner of the copyright in the statute. . . ." Brief for Appellee at 24 n. 15. Joint ownership, Reid maintains, was not urged before the district court. As we observed *supra* note 10, the Fifth Circuit decision in *Easter Seal Society* had not yet issued at the time of the district court's decision declaring CCNV sole owner of the copyright. Our adoption of the "literal interpretation" has so fundamentally changed the legal framework for this case that we deem it in order now to entertain CCNV's alternate joint authorship claim. We refrain, however, from ruling dispositively on the issue; instead, we accord Reid an opportunity to develop before the district court any factual or legal arguments he wishes to present in answer to CCNV's alternate claim to joint authorship. *See Meehan v. Macy*, 425 F.2d 469, 472 (D.C. Cir. 1968) (analyzing nature and implications of intervening Supreme Court decision but ordering remand to "permit introduction of additional evidence and argument on points that have a significance . . . previously only dimly discerned"), *aff'd per curiam on rehearing en banc*, 425 F.2d 472 (D.C. Cir. 1969); *see also Thompson v. Kennickell*, 836 F.2d 616, 621 (D.C. Cir. 1988) (remanding in light of intervening Supreme Court decision).

World America," Reid retained the entire construction, not just the figures he had sculpted.

Nor does it appear—again, we caution, from the current record—that the steam grate pedestal is so insignificant a contribution to the work of art that it fails to reflect the requisite "originality" and "authorship." As we have already indicated, *see supra* p. 1495, the standard for determining whether a creation is an "original work of authorship" is not high. "It suffices if the author refrains from copying from prior works and contributes more than a minimal amount of creativity." A. LATMAN, R. GORMAN & J. GINSBURG, *supra*, at 29; *see also* 1 M. NIMMER & D. NIMMER, *supra* note 8, § 6.03, at 6-6 and § 6.17, at 6-18 (joint authors need not "work in physical propinquity"; their contributions need not be equal either quantitatively or qualitatively; though contribution of each must be more than *de minimis*, one may qualify as a joint author even if his contribution, "standing alone would not be copyrightable").[15]

Reid observed, in resisting joint work characterization, that "[c]opyright protection does not extend to utilitarian works and the base certainly has utilitarian and functional aspects." Reply Brief at 17. The first part of this observation is more secure than the second. The 1976 Act defines "useful article" as one "having an intrinsic utilitarian function *that is not merely to portray the appearance of the article*. . . ." 17 U.S.C. § 101 (emphasis added). The steam grate pedestal on which "Third

[15] If Nimmer is correct on the point that the contribution of a joint author need not be copyrightable "standing alone," even CCNV's choice of the title "Third World America" and the legend for the pedestal, 652 F.Supp. at 1454, while not independently copyrightable, *see* W. PATRY, *supra*, at 45-47, may count, along with other CCNV contributions, toward meeting the "more than *de minimis*" threshold required for joint authorship.

World America's" figures huddle surely was designed and constructed precisely "to portray the appearance of" an actual streetside grate.

Most prominently undercutting Reid's claim of sole authorship, the district court found that CCNV "was the motivating factor in the procreation of 'Third World America,' " "conceived the idea in starkly specific detail," and "directed enough of [Reid's] effort to assure that, in the end, he had produced what [CCNV] not he, wanted. . . ." 652 F.Supp. at 1456.[16] In making this point, we do not overlook the "idea/expression dichotomy"; as stated in the 1976 Act, "[i]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is . . . embodied in such work." 17 U.S.C. § 102(b). *See, e.g., Meltzer v. Zoller*, 520 F.Supp. 847, 857 (D.N.J. 1981) (dispute over copyright interest in architectural plans for plaintiff's home; plaintiff contributed ideas and sketches, made certain changes, and exercised approval power; plaintiff's contributions were held insufficient to constitute "fixed expressions of ideas," hence plaintiff could not be considered an "author" or "joint author" of the plans); *see generally*, W. PATRY, *supra*, at 116. "Third World America," however, was more than CCNV's abstract idea. Following CCNV's original conception of the sculpture, Snyder and other CCNV members, the district court found, monitored the progress of the work, not simply to approve Reid's embodiment of their idea, but to guide his expression and coordinate with his effort

[16] The district court found, in particular, after hearing conflicting testimony, that the reclining, rather than standing or sitting, posture of the figures was CCNV's idea, not Reid's, and that it was also CCNV's idea to use a shopping cart instead of suitcases or shopping bags as the repository for the homeless family's belongings. 652 F.Supp. at 1455 & n. 5.

CCNV's construction of the steam grate pedestal. *See* 652 F.Supp. at 1455-56.[17]

In sum, were it not for the prevailing confusion over the work for hire doctrine,[18] this case—once more taking the record in its current state—might qualify as a textbook example of a jointly-authored work in which the joint authors co-own the copyright. We note in this regard Reid's original and creative contribution to the figures; CCNV's contribution to the steam grate pedestal added to its initial conceptualization and ongoing direction of the realization of "Third World America"; and the various indicia of the parties' intent, from the outset, to merge their contributions into a unitary whole, and not to construct and separately preserve discrete parts as independent works. *See Strauss v. Hearst Corp.*, 1988 Copyright L.Rep. (CCH) ¶ 26,244 (S.D.N.Y.) (magazine's initial conceptualization, ongoing supervision, and creative contributions to photo layout indicate

[17] Case law concerning joint authorship in relation to the idea/expression dichotomy is sparse largely because the broad scope of the work for hire doctrine under the 1909 Act tended to draw disputes in which one party claimed to be the creative motivating force in the production of a copyrightable work into the ambit of that doctrine. With the substantial cutback of the work for hire doctrine under the 1976 Act, more cases of this genre can be expected to appear under the joint authorship rubric.

[18] The *Easter Seal Society* court stated that the work for hire claim made in that case would probably have failed on any view of the 1976 Act. The tapes there in question had been "commissioned as part of an audiovisual work within the meaning of § 101(2)," 815 F.2d 336; under § 101(2), such a work constitutes a work for hire only if the parties, in a signed writing, "expressly agree" to that designation. In this case, no such alternate ground of decision is available, and conflict with *Aldon Accessories* is unavoidable. Had we determined that the "sufficiently supervised and directed" test framed in that case correctly construed the 1976 Act, we would have affirmed the district court's judgment declaring Mitch Snyder, as trustee for CCNV, exclusive owner of copyright in the sculptural work "Third World America."

co-authorship of joint work with photographer). We do not instruct the final decision, however, so that Reid may have a full and fair opportunity to rebut CCNV's joint ownership claim and to pursue a question Reid has raised regarding the identity of potential joint authors.

Reid observes that CCNV engaged others to construct the pedestal and supply its components; he asserts that "the Court has insufficient information before it to determine whether CCNV is in fact the 'author' of the base." Reply Brief at 17. The possibility of joint authorship was not considered by the district court, and the record on contributions of participants other than Reid and CCNV is limited. We do know, not only that CCNV engaged others, but that Reid himself was "assisted at various times by a dozen different people, all paid by him, from funds. . . . provided by CCNV." 652 F.Supp. at 1455. It may well be that all other participants in the composition of "Third World America" were either (1) employees of Reid or CCNV within the applicable rules of agency law, *see Easter Seal Society*, 815 F.2d at 329 & n. 11, 335-36 & n. 20, and therefore subject to the work for hire doctrine, or (2) artisans carrying out specific orders, *i.e.*, workers who did not meet the "more than *de minimis*" standard of originality and creativity, *see supra* p. 1496, needed to qualify for authorship. We are not prepared to rule definitively on this issue, however. We therefore refer the matter to the district court with instructions to determine if there are any other parties who might qualify as "Third World America" authors and, on that account, should be joined in this action. *See* FED.R.CIV.P. 19; 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1614, at 140 (1972).

We address, finally, a peculiar feature of this case noted earlier, *see supra* note 4, one on which the parties' presentations are cloudy. There is only one "copy" of the copyrighted work at issue, and that only existing copy is exclusively owned by CCNV. Joint authors co-

owing copyright in a work "are deemed to be tenants in common," with "each having an independent right to use or license the copyright, subject only to a duty to account to the other co-owner for any profits earned thereby." W. PATRY, *supra*, at 116 (footnotes omitted). In the absence of an agreement specifying otherwise, any profits earned are to be divided equally, "even where it is clear that [the] respective contributions to the joint work are not equal." 1 M. NIMMER & D. NIMMER, *supra* note 8, § 6.08, at 6-20 (footnote omitted). But singular works of art, we recognize, do not fit comfortably into a scheme centrally concerned with reproduction of the underlying work. *See* BRENNER, *a Two-Phase Approach to Copyrighting the Fine Arts*, 24 BULL. COPYRIGHT SOC'Y 85, 85 (1976-77).

Reid, as we mentioned earlier, objected to CCNV's travel plans for "Third World America," and planned a more modest exhibition tour of his own. *See* 652 F.Supp. at 1456. Co-ownership (or even sole ownership) of the copyright does not appear to carry with it a right to stop or limit CCNV's tour or to gain possession of the unique work of art. *See* 17 U.S.C. § 109(a), (c). Snyder once invited Reid to have a "master mold" of the sculpture made at Reid's own expense. *See* 652 F.Supp. at 1456. We have so far come upon no current authority for a court to order renewal of that invitation. *But see Baker v. Libbie*, 210 Mass. 599, 606, 97 N.E. 109, 111-12 (1912) (writer of letter retains copyright; but recipient or present possessor has right to destroy letter itself; yet ownership of copyright "involves a right to copy or secure copies[,] [o]therwise, the author's right of publication might be lost").

If CCNV reproduces "Third World America" in any medium and profits thereby, however, an accounting would be due to Reid as a copyright owner. Independent of Reid's ownership of the copyright, CCNV might be obliged to credit Reid as an author of the sculpture. *Cf.*

Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981); *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F.Supp. 1278, 1284-85 (W.D. Ark. 1987); *Follett v. Arbor House Publishing Co.*, 497 F.Supp. 304, 311 (S.D.N.Y. 1980) (all three decisions concern correction under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982), in attribution of authorship or representation of a creator's role). Furthermore, Reid, as an author, may have rights against CCNV should it publish an excessively mutilated or altered version of "Third World America." *See Gilliam v. American Broadcasting Co.*, 538 F.2d 14 (2d Cir. 1976); Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L.REV. 1, 17-34 (1985) (discussing various common law and statutory doctrines available to protect a creator against publication of excessively mutilated versions of his work but not against destruction); Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention, *reprinted in* 10 COLUM.-VLA J. LAW & ARTS 513, 547-57 (1986) (current protection of moral right under U.S. common law doctrines and statutes sufficient to meet moral rights requirements of Article 6*bis* of Berne Convention for the Protection of Literary and Artistic Works).

CONCLUSION

For the reasons stated, we conclude that the district court incorrectly held the work for hire doctrine applicable to the dispute between Reid and CCNV over copyright in the sculptural work "Third World America." We therefore reverse the judgment from which this appeal has been taken and remand the case for further proceedings consistent with this opinion, particularly, for comprehensive consideration whether the sculpture called "Third World America" is a joint work and, if it is, for determination of the owners of copyright in the work.

It is so ordered.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 86-1507

COMMUNITY FOR CREATIVE NON-VIOLENCE, *et al.*,
Plaintiffs,

v.

JAMES EARL REID, *et al.*,
Defendants.

Feb. 9, 1987

Timothy D. Junkin, Washington, D.C., for plaintiffs.

William Zinman, Baltimore, Md., for defendants.

DECISION AND ORDER

JACKSON, District Judge.

Plaintiffs Community for Creative Non-Violence ("CCNV"), a Washington-based non-profit unincorporated association of persons committed to the causes of the homeless people of America, and its agent, Mitch Snyder, sue James Earl Reid, a Baltimore sculptor and his photographer colleague, Ronald Purtee, for relief under the Copyright Act of 1976, 17 U.S.C. §§ 101-702 (the "Act"), to determine and enforce their rights with respect to a statute sculpted by Reid pursuant to an oral agreement with Snyder in the fall of 1985.[1] Specifically,

[1] Although named as a defendant, Purtee has not appeared, and has made no claim to any interest in the statute, in this case.

CCNV and Snyder pray that they be declared the owners of the copyright, and that Reid (and anyone else claiming with him) be permanently enjoined from infringing upon that copyright in any manner.[2] Upon the following facts, as found by the Court in accordance with Fed. R. Civ. P. 52(a) upon trial without a jury, the Court concludes, for the reasons stated, that judgment must be given for plaintiffs and the relief prayed, in substance, be granted.

I.

In late September or early October, 1985, at a friend's suggestion, Snyder determined that CCNV would sponsor a display at the forthcoming national Christmastime Pageant of Peace on the Ellipse in Washington, D.C., to dramatize the plight of the nation's homeless. Snyder and fellow CCNV members conceived the idea for the nature of the display: a sculpture of a modern Nativity scene in which, in lieu of the traditional Holy Family, the two adult figures and the infant would appear as contemporary homeless people huddled on a streetside steam grate. The family was to be black (most of the homeless in Washington being black); the figures were to be life-sized, and the steam grate would be positioned atop a platform "pedestal," or base, within which special-effects equipment would be enclosed to emit simulated "steam" through the grid to swirl about the figures. They also settled upon a title for the work—"Third World America"—and a legend for the pedestal: "and still there is no room at the inn."

Snyder then made inquiries to locate an artist to do the work and was referred by a mutual artist-acquaintance in Massachusetts to James Earl Reid. The agreement between Snyder and Reid was reached in the course of two telephone calls in October, 1985. Reid, enthusiastic from the outset about the project, at first

[2] Plaintiffs' claims for statutory damages and attorneys' fees were withdrawn at trial.

proposed that the work be cast in bronze, at a total cost approaching $100,000 or more, and taking six to eight months to complete. Told by Snyder that CCNV did not have such a sum to spend, and that the statute had to be completed by December 12th to be included in the Pageant of Peace, Reid suggested an alternative material known as "Design Cast 62," a synthetic substance with which he could work more quickly and would cost substantially less. Reid assured Snyder that Design Cast 62 was sufficiently durable to withstand the elements—"as strong as concrete," according to Snyder—and could be tinted to resemble bronze. Snyder agreed to the use of Design Cast 62. Reid then estimated the cost to $12,000 to "no more than" $15,000, not including his services which he offered to donate, and Snyder assented to the price. Reid then promised to endeavor to meet the deadline, and the bargain was complete. Neither party mentioned copyright.[3]

Reid commenced work immediately, making sketches of individual figures in possible poses, and CCNV members made plans for an art auction to raise funds by selling works donated by other artists in sympathy with their cause. About November 1st CCNV paid Reid an advance of $3,000 and Reid sent CCNV a sketch of a proposed arrangement of the figures showing the family in a "classic" creche-like relationship to one another: the mother seated (as if on a chair, although the object

[3] Reid testified that he imposed two other conditions which Snyder expressly accepted: that he would "reserve his full copyright rights" in the work, and retain "total [artistic] control." The Court finds otherwise. Not only is the testimony without any corroboration, but the conditions themselves are inconsistent with the tenor of the enterprise. Neither Reid nor Snyder were thinking of the venture in profit-making terms at the time (although Snyder had some thoughts about the statue's fundraising potential in the future), and Snyder and CCNV had specific ideas about the sculpture's ultimate appearance which they would have been unwilling to surrender to someone else's "control," even the artist's.

is not shown), cradling the infant in her lap, and the father standing behind her, bending over her right shoulder to touch the infant's foot with his right hand.[4]

Shortly thereafter Reid asked Snyder if he knew of a black family who could pose as models, and Snyder promptly suggested a family living at CCNV's Washington shelter whose baby had recently been born there, inviting Reid to visit them and decide for himself. Reid did so, and rejected the adults, whose appearances he found inappropriate, but accepted the child. (He ultimately used Mr. Purtee and a female acquaintance as his adult models.) While in Washington Snyder took Reid on a brief tour of nearby steam grates to observe homeless people in their habitat, pointing out to him that they were wont to recline, rather than sit or stand, on the grates to warm their entire bodies, and from that time all Reid's representations of the proposed statute contemplated recumbent figures only.[5]

Throughout November and the first two weeks of December Reid worked long hours exclusively on the statue, assisted at various times by a dozen different people, all paid by him, from funds, however, provided by CCNV. (It is undisputed that CCNV paid Reid the full price of $15,000). From the time of his construction of the arma-

[4] Reid says Snyder asked for the sketch for "fundraising" purposes. Snyder says it was also for his "approval," which Reid denies.

[5] Reid says that he had always known that people lie on steam grates, and had planned the statue that way himself. His preliminary sketch suggests, and the Court finds, otherwise.

Reid also says it was his idea to use the shopping cart as the repository for the family's personal belongings, as it appears in the completed statue, but four CCNV witnesses (including the artist from Massachusetts who worked as Reid's assistant throughout) testified, and the Court again finds, that Reid at first favored "suitcases" or "shopping bags," but was persuaded by Snyder and CCNV members to use a shopping cart as an accessory more typical of the homeless.

ture through the final clay rendering he was visited on a number of occasions by various CCNV members, ostensibly to check on his progress and to coordinate CCNV's construction of the base or pedestal. (In the meantime CCNV had ordered the special-effects equipment from sources in Hollywood at a cost of $7,000-$8,000.) On no occasion was the subject of copyright mentioned.

The clay model was ready for casting on or about December 12th, but the mold not yet made, when Snyder telephoned Reid to demand that the statue be delivered immediately or it would be excluded from the Pageant of Peace.[6] Reid replied that it simply could not be done, and was then told by Snyder to take the time necessary to permit him to deliver a "first class work." He did so, and delivered the finished "Third World America" to the Ellipse himself on December 24, 1985, receiving a final payment of $3,000 from Snyder.[7]

The statue remained on display near the Ellipse for a month. In late January, 1986, CCNV members returned the statue to Reid's studio in Baltimore for repair of some minor damage done in its transit to the Ellipse. In mid-February, Snyder began making plans to take the statue on a tour of several cities and exhibit it at major galleries to raise money for the homeless. Reid came to Washington, accompanied by a lawyer, to protest that the Design Cast 62 material was not strong enough to withstand the rigors of travel and to urge CCNV to have the

[6] In fact, the statue was rejected by Pageant officials, who declined for policy reasons to accept any display with what might be regarded as a political message, and was eventually exhibited at a nearby site.

[7] Immediately beneath the title on the finished work, which appears in raised letters on the box in which the baby lies, Reid inscribed the letter "C," encircled, and his name, to indicate his claim to a copyright for it, a claim the Court finds to have been made for the first time on December 24th.

statue cast in bronze for about $35,000, or at least to have a "master mold" made, at a cost of $5,000, to permit a duplicate to be cast if the original were irreparably damaged. Snyder declined to expend any more of CCNV's money on the project, but invited Reid to do spend his own if he wished. Several weeks later Synder called Reid to demand return of the statute, following which, without returning it, Reid filed a Certificate of Copyright Registration for it in his name with the Copyright Office, Library of Congress, on March 20, 1986, and announced plans for a more modest exhibition tour of his own for the statue.[6] This lawsuit ensued on June 2, 1986, in connection with which plaintiffs sought and obtained a preliminary injunction restoring the statue to their possession.

II.

The Copyright Act declares that "[c]opyright in a work . . . vests initially in the author or authors," 17 U.S.C. § 201(a), and, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . [and] owns all of the rights comprised in the copyright" unless otherwise expressly agreed in writing. *Id.* § 201(b). A copyright can be conveyed, *id.*, § 201(d), but only in writing, *id.*, § 204(a), and in this case there is neither an agreement in writing between the parties as to ownership of the copyright in "Third World America," nor a unilateral instrument in writing purporting to convey it. Consequently, ownership of the copyright turns upon the identity of the statutory "author," which, in turn, depends upon whether the statue is a "work made for hire."

A "work made for hire" is defined, for purposes of this case, as "a work prepared by an employee within the scope of his or her employment. . . . ," *id.*, § 101, but for

[6] Snyder also registered a copyright, in his own name, on May 21st.

statutory copyright purposes generally, the employment relationship giving rise to a copyright is somewhat more expansive than the master-servant relationship found in the common law of agency. Under the Act one may be an employee "regardless of whether he is paid on the basis of a conventional periodic salary, on a piece work basis, on a fee or royalty basis, or even if [he works] as an accommodation with no compensation at all." 1 Nimmer on Copyright, § 5:03[B][1][a](1985). If the putative "employer" was either the "motivating factor" in the production of the work, or possessed the right to "direct and supervise" the manner in which the work was done, the copyright is his no matter the degree of creative license actually exercised by the artist-employee. *Id.*; *Murray v. Gelderman*, 566 F.2d 1307, 1310-11 (5th Cir. 1978); *see also Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552 (2d Cir.), *cert. denied*, 469 U.S. 982, 105 S.Ct. 387, 83 L.Ed.2d 321 (1984); *Town of Clarkstown v. Reeder*, 566 F.Supp. 137, 141-42 (S.D.N.Y. 1983).

It is indisputable on this record that plaintiff CCNV was the motivating factor in the procreation of "Third World America." Snyder and his colleagues not only conceived the idea of a contemporary Nativity scene to contrast with the national celebration of the season, they did so in starkly specific detail. They then engaged Reid to utilize his representational skills, rather than his original artistic vision, to execute it. And while much was undoubtedly left to his discretion in doing so, CCNV nevertheless directed enough of his effort to assure that, in the end, he had produced what they, not he, wanted, notwithstanding his creative instincts may have been in harmony with theirs. Finally, they paid in full for the work, making their final payment only when satisfied, upon delivery, that the statute did, indeed, convey the message they had intended for it.

Reid could have bargained with CCNV for the copyright but did not do so. Consequently he will have to content himself with the considerable acclaim the statue has and will receive, and the public's recognition of him as the talented artist who executed it. But in the absence of a writing to the contrary, the law leaves no doubt that "Third World America" is a work made for hire, and CCNV the exclusive owner of the copyright therein.

For the foregoing reasons, therefore, it is, this 9th day of February, 1987,

ORDERED, that judgment be entered for plaintiffs; and it is

FURTHER ADJUDGED and DECLARED, that the copyright in and to that work of sculpture known as "Third World America" is vested exclusively in Mitch Snyder, trustee, for the use and benefit of the Community for Creative Non-Violence, a voluntary unincorporated association; and it is

FURTHER ORDERED, that Certificate of Copyright Registration for "Third World America" No. VAU 90-127 of March 20, 1986, in the name of James Earl Reid is declared null and void, and is cancelled; and it is

FURTHER ORDERED, that defendants James Earl Reid and Ronald Purtee, their officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are permanently enjoined from exercising, or attempting to exercise, any of those rights enumerated in 17 U.S.C. § 106 with respect to the work of sculpture known as "Third World America," except as otherwise provided in 17 U.S.C. §§ 107-18.

RESTATEMENT (SECOND) OF AGENCY (1958)

§ 220. Definition of Servant

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.